

1 A I don't know.

2 Q How about as it -- as water comes off of the property? Has the regional board
3 ever done any inspection or test to determine the quality of water as it exits the
4 Moritz property?

5 A Only that I have seen pictures of the property by the city of Poway putting in
6 their interim BMPs. I have seen it during a rain event, a picture of it.

7 Q What did you conclude based upon the picture?

8 A That water was going across his property, there was some sediment in it from
9 upstream.

10 Q Did you make any determination whether the water quality was degraded as it
11 exited his property?

12 A I don't have enough information to make that determination.¹³

13 Q As we sit here today, does the regional board have any evidence that there
14 were any exceedances of any of these constituents of concern or these water
15 quality objectives, rather, at any time?

16 A Not that I -- not that I know of.¹⁴

17 Moreover, the California legislature and this board's Basin Plan state specifically that it may be
18 possible for the quality of water to be changed to some degree *without unreasonably affecting beneficial*
19 *uses*. (Water Code section 13241; RWQCB Basin Plan at page 3.1) In other words, not every change in
20 the quality of water is an *impermissible* change where change for which a cleanup and abatement order
21 ought to issue. Or shall any visible change in water quality here, there is simply no evidence of adverse
22 effects of the Moritzes' property on water quality. The suggestion that there might be is pure conjecture,
23 particularly in light of upgradient sources of silt and sediment that are more significant than exist on the
24 Moritzes' property. Tentative CAO 2008-0152 should not issue because there is no evidence of a
25 degradation of water quality, which is RWQCB's primary objective.

26 **CAO R9-2008-1052 SHOULD NOT ISSUE BECAUSE THERE HAS**
27 **BEEN NO DISCHARGE OF WASTE TO WATERS OF THE STATE:**

28 California Water Code sections 13260 and 13264 in essence preclude discharges of wastes to
waters of the state absent appropriate reporting and issuance of waste discharge requirements (WDRs).
But the California legislature does not define waste in such a way as to necessarily include clean fill soil.
""Waste" includes sewage and any and all other waste substances, liquid, solid, gaseous, or radioactive,
associated with human habitation, or of human or animal origin, or from any producing, manufacturing,

¹³ Deposition of RWQCB staff member Christopher Means at pages 59-60.

¹⁴ Deposition of RWQCB staff member Christopher Means at 82:12-17

1 or processing operation, including waste placed within containers of whatever nature prior to, and for
2 the purposes of, disposal." Water Code section 13050.

3 The definition of "waste" does not necessarily include fill soils. Although that might be
4 RWQCB expedient, the statute itself will does not extend so far. Indeed, the specific enumeration of the
5 types of things that constitute waste suggest deleterious, harmful, or toxic substances, distinguishable
6 from clean fill soils. A plain reading of the statute does not lead to the conclusion that clean fill dirt
7 voluntarily acquired and serving a useful purpose of preventing harm to one of his property is a waste or
8 a disposal thereof. Had the California legislature wanted to extend the definition to clean fill soils, it
9 could have and should have said so in the definitional statute.

10 Moreover, there was no discharge to "waters of the state." The Water Code defines "waters of
11 the state" to mean "any surface water or groundwater, including saline waters, within the boundaries of
12 the state." By definition, an ephemeral streambed is not "water;" a streambed is a solid, liquid. In San
13 Diego, most of the year is devoid of any precipitation whatsoever. Only in infrequent high-volume
14 flood events does the depression in the Moritzes' yard gather water. Most of the time, it is just a field,
15 completely dry. Had the legislature intended "waters of the state" to mean an ephemeral streams that
16 only flow during significant rain events, the legislature could have and should have said so. It could
17 have said "'waters of the state" means surface water, groundwater, and ephemeral stream beds," for
18 example. Dry stream beds are not what people typically viewed as "waters of the state." There are other
19 regulatory agencies who have responsibility for managing solid waste, such as the Integrated Waste
20 Management Board.. RWQCB's charge, on the other hand, is responsibility for the coordination and
21 control of water quality. California Water Code section 13001. Had the California legislature intended
22 to confer jurisdiction over all land upon which rain falls, it could have and should have done so. But
23 instead, it defined waters in such a way as to specifically mention only surface water and groundwater.

24 Similarly, a plurality of the United States Supreme Court recently concluded similarly that
25 "waters of the US" do not necessarily include ephemeral, intermittently flowing streams. Rapanos v.
26 United States 547 U.S. 714 (2006). In order to determine whether streams bearing water that flows only
27 during precipitation events, given the plurality nature of the Court's opinion, there must be a
28

1 determination of whether there is a significant nexus between wetlands and navigable waters of the
2 United States. Here, there has been no assertion of jurisdiction by the United States, and whether the
3 United States would or could assert jurisdiction is speculative and without supporting evidence in the
4 record.¹⁵

5 Here, as discussed elsewhere above, RWQCB has no evidence about the water quality as it
6 enters onto the Moritzes' property, and no evidence as it leaves back property. It has no evidence about
7 whether the Moritzes' property degrades water quality, its only information is speculative. That does not
8 establish a significant nexus between this ephemeral drainage area or potential harm from it to a
9 receiving body of water.

10 The primary purpose of statutory interpretation is to ascertain the intent of the lawmakers so as to
11 effectuate the purpose of the law. Scripps Health v. Marin (1999) 72 Cal.App.4th 324, 332 [85
12 Cal.Rptr.2d 86].) "Statutory interpretation begins with the text and will end there if a plain reading
13 renders a plain meaning: a meaning without ambiguity, uncertainty, contradiction, or absurdity." Oden
14 v. Board of Administration (1994) 23 Cal.App.4th 194.

15 Although the State Water Board has taken the position that "waters of the state" extends to
16 perennial, to intermittent and to ephemeral watercourses, from headwater regions to lowland river
17 mouths, this appears to be an interpretation beyond what the legislature intended. Fill soils such as those
18 involved in the current manner, are not necessarily "waste." Absent a discharge of waste to waters of
19 the state, the tentative CAO should not issue.

20
21
22 ¹⁵ Q Now, as far as this stream is concerned, have you heard from any source that the United States is asserting jurisdiction
over that particular ephemeral stream?

23 A No.

24 Q Have you determined from any source whether the United States can assert jurisdiction over that ephemeral stream in
light of existing precedent?

A It's possible.

25 Q Have you heard that the United States is not going to assert any jurisdiction over that ephemeral stream?

26 A I have heard from Robert Smith at the Army Corps of Engineers, and through you, that the Army Corps is
overwhelmed right now, and I believe in an e-mail that I can't remember the date of, they offered for your client to accept
27 jurisdiction, which you declined, but that a jurisdictional delineation has not been done. So it's -- it could potentially be
waters of the U.S. under federal jurisdiction. It could not.

Q We just don't know as we sit here today?

28 A Right. I think it would take a forensic jurisdictional determination to determine that.

1 **CAO R9-2008-1052 SHOULD NOT ISSUE BECAUSE THE MORITZES ARE**
2 **CONSTITUTIONALLY ENTITLED TO PROTECT THEIR PROPERTY**

3 The Moritzes are citizens of the State of California, and have rights guaranteed by the California
4 Constitution, article I, section 1, including the rights to protect their property, to obtain their safety, and
5 to have privacy:

6 "All people are by nature free and independent and have inalienable rights.
7 Among these are enjoying and defending life and liberty, acquiring, possessing,
8 and protecting property, and pursuing and obtaining safety, happiness, and
9 privacy." California Constitution, Article I, Section 1.

10 Here, the Moritzes had concerns about damage to their property and the threat of future damage,
11 particularly related to fires and scouring, sediment, and debris that had occurred after the Witch Creek
12 fires. Consequently, the notification of streambed alteration contained a drawing showing the property
13 ringed with fire roads, to permit access to fire trucks to allow the defense of the property. (Exhibit 9, at
14 page 62.13.) The Moritzes are constitutionally entitled to protect their property from storm waters and
15 to take reasonable measures to protect themselves from future fires. Accordingly, the tentative CAO
16 should not issue.

17 **THE REGIONAL BOARD SHOULD ISSUE A TEMPORARY WAIVER AS TO WDRS**

18 California Water Code section 13269 permits the regional board to authorize a waiver of Waste
19 Discharge Requirements if the regional Board determines that the waiver is consistent with any
20 applicable state or regional water quality control plan and is in the public interest. There is no evidence
21 that the Moritzes' property degrades water quality. There is no record evidence of the quality of water
22 upgradient or downgradient at the boundaries of the Moritzes' property — no background levels from
23 which to judge whether the quality of water is affected.

24 The sediment-control measures taken pursuant to the City of Poway's abatement order, and
25 previously taken by Bill Moritz himself, are controlling sediments — the site is stabilized. RWQCB
26 staff person Christopher Means testified:

27 Q Do you know today whether the site is
28 stabilized as far as erosion control and sediment

control is concerned?

A From the photographs I've seen of the abatement work that was performed by the city of Poway, so far to date those BMPs seem to be preventing erosion and discharge of sediment off-site from your client's property.¹⁶

There is no evidence of an imminent threat to water quality. Time might assist the alleged dischargers in finding the resources to respond to the tentative CAO, as might occur if they are capable of persuading their carrier to respond to the City of Poway's lawsuit.

LIST OF WITNESSES

Bill and Lori Moritz each intend to testify at the February 11, 2008 hearing. Bill Moritz intends to testify to the facts set forth herein and facts relating to the proposed CAO, except for subjects about which Lori Moritz intends to testify. Lori Moritz intends to testify as to economic considerations and as to the dischargers' resources to respond to the CAO. Given the time limitations imposed, we expect these witnesses to provide their direct testimony in approximately 15 minutes and five minutes respectively, exclusive of cross examination and rebuttal.

Dated: January 23, 2009

THE SIMPSON LAW FIRM,
A Professional Corporation
Attorneys for Bill and Lori Moritz


By: Douglas J. Simpson

¹⁶ Deposition of Christopher Means at 85:6-13.

Exhibit 1

Poway Fire 2007

Redneck Fire Dept
21-27 Oct 2007



Western sky says it all



Smoke building at the North



Getting darker on the North side



Burn approaches from the North east



Fire Dept comes by to join the Lookie-loos
.... and leaves ...



North side lights up

Poway Fire 2007

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Redneck Fire Dept
21-27 Oct 2007



Bill's horses hang out in his back yard
while the fire heads for Ed



Fire dudes crash out in the front yard



Sean and Bill work the north side while they rest



Coming down from the East



Look out Ed, here it comes



Tuesday am end of break - 0545 hrs
Hot 'n heavy at the Constables

Poway Fire 2007

- Page 3 -

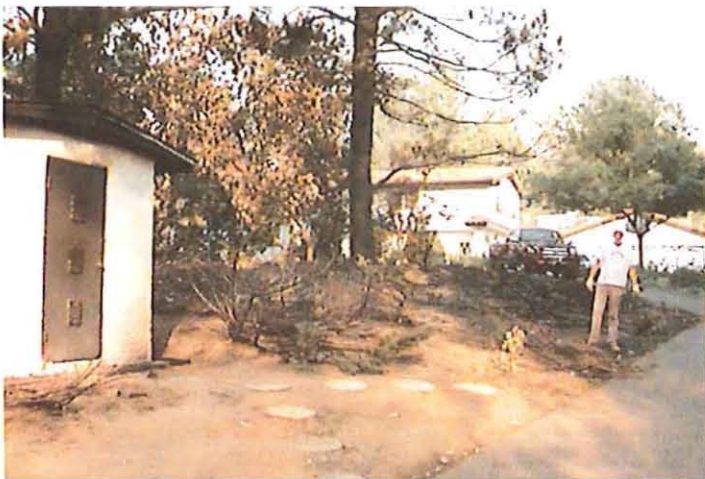
Redneck Fire Dept
21-27 Oct 2007



The little stump that wouldn't give up



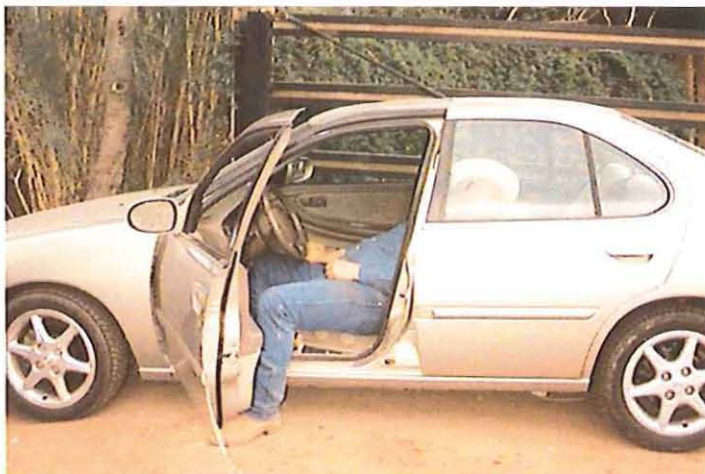
Gilligan Fire Truck
Jamie and fire dog, Holly



Ken finally figures out we DO need water



For a good time horsing around
call



Sean snags a few winks
between hot spot patrol



The Redneck Volunteer Fire Brigade
Sean, Randy, Ed and Bill

Exhibit 2